No. 90-1027

In The

Supreme Court of the United States

October Term, 1990

HELEN JEAN GUERCIO,

Petitioner,

v.

GEORGE BRODY AND JOHN FEIKENS,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT THE HONORABLE JOHN FEIKENS

James K. Robinson
Counsel of Record for Respondent the Honorable John Feikens
Jay E. Brant
Lee W. Brooks
Honigman Miller Schwartz and Cohn
2290 First National Building
Detroit, Michigan 48226
(313) 256-7800

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the court of appeals correctly held the Honorable John Feikens entitled to dismissal as a matter of law on grounds of qualified immunity where, based on the well-pleaded, non-conclusory factual allegations of plaintiff Guercio's second amended complaint for wrongful termination, a reasonable judge in Judge Feikens' position could have concluded that authorizing Guercio's termination was an option that he could act upon without violating her constitutional rights.

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OPINIONS BELOW

The opinion of the court of appeals reversing the district court's order denying defendants' motions to dismiss (Pet. App. 3a-29a) is reported at 911 F.2d 1179 (6th Cir. 1990).

JURISDICTION

The judgment of the court of appeals was entered on August 13, 1990. An order denying Guercio's petition for rehearing was entered on September 26, 1990. The petition for a writ of certiorari was filed on December 26,

1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Procedural History

Plaintiff's original complaint against George Brody, then a bankruptcy judge, and John Feikens, then Chief District Judge of the Federal District Court for the Eastern District of Michigan, was filed in October 1984; an amended complaint was filed in January 1985. The district court granted defendants' motion to dismiss on grounds of absolute judicial immunity on August 6, 1985.

After plaintiff appealed, the United States Court of Appeals for the Sixth Circuit reversed. *Guercio v. Brody*, 814 F.2d 1115 (6th Cir. 1987). The Sixth Circuit granted rehearing *en banc* solely as to Judge Feikens, *Guercio v. Brody*, 823 F.2d 166 (6th Cir. 1987), but then reversed itself *sua sponte* and reinstated its original decision. *Guercio v. Brody*, 859 F.2d 1232 (6th Cir. 1988). The order of remand to the district court stated that the district court was to give the case further consideration "in light of" *Forrester v. White*, 484 U.S. 219 (1988), an absolute immunity case.

Following remand, plaintiff filed a second amended complaint ("the complaint"), and both defendants moved to dismiss it. Judge Feikens' motion was on grounds of absolute and qualified immunity, in the alternative. Both motions were denied by the district court, which, pursuant to the Sixth Circuit's instructions, addressed both the absolute immunity issue under *Forrester* and the qualified immunity issue. Both defendants appealed, and the Sixth Circuit reversed, holding that: (1) "further consideration of absolute immunity is foreclosed by the *Forrester* rationale" that "judges are not entitled to absolute immunity from suit for actions arising out of personnel decisions," but that (2) based on the nonconclusory allegations of the complaint, both judges are entitled to

qualified immunity. *Guercio v. Brody*, 911 F.2d 1179, 1182 n.2 & 1189 (6th Cir. 1990); Pet. App. 7a & 22a.

B. Facts

In holding that Judge Feikens' motion for dismissal should have been granted, the Sixth Circuit reviewed the nonconclusory factual allegations of Guercio's complaint to determine whether, at the time Guercio was terminated, judges of reasonable competence in the position of Judge Feikens could have disagreed on whether terminating Guercio was an option that could be acted upon without violating her constitutional rights.

Guercio, who was Judge Brody's personal and confidential secretary, alleges in her complaint that, in October 1981, she was terminated by her immediate superior, Bankruptcy Judge George Brody, in violation of her constitutional rights. She made the same claim against then Chief District Judge John Feikens, who approved the termination pursuant to authority granted to him by the Sixth Circuit Judicial Council and the District Court for the Eastern District of Michigan.

Guercio's complaint alleges that, beginning in October 1979, two years prior to her termination, she became aware of a serious pattern of official misconduct in the Bankruptcy Court for the Eastern District of Michigan. At this time, the Bankruptcy Court was comprised of four judicial positions, three of them in Detroit. The Detroit Division of the Bankruptcy Court therefore included only three judges, their personal staffs, the Clerk of the Bankruptcy Court, and his staff. The repercussions of the disclosures of misconduct included:

(1) the indictment, in or about May 1981, of the Chief Clerk of the Bankruptcy Court on federal charges based on malfeasance and conflict of interest in the performance of his duties;

(2) the recommendation, in June 1981, of a Merit Screening Committee against the reappointment of a sitting bankruptcy judge, which finding was accepted in a report by the Chief Judge of the Sixth Circuit, leading to the bankruptcy judge's resignation (copies of the Merit Screening Committee report and the Chief Judge's report are Appendices A and B hereto, respectively);

(3) the indictment, in 1982, of a prominent bankruptcy attorney and a bankruptcy court clerk on federal charges of conspiracy to defraud, obstruction of justice, receipt of gratuities, and bankruptcy fraud; and

(4) the subsequent convictions of the Chief Clerk, the bankruptcy attorney, and the bankruptcy court clerk on the offenses charged.

As the pattern of misconduct involving the bankruptcy court began to unfold, the Sixth Circuit Judicial Council took action. In a May 6, 1981, order (hereinafter referred to as the "Judicial Council's order"), signed by the Chief Judge of the Sixth Circuit, and captioned "In the matter of: Clerk of the Bankruptcy Court Eastern District of Michigan," the Council stated:

> By a companion order entered today the Council has directed that William Harper be suspended from the performance of his duties as Clerk of the Bankruptcy Court for the Eastern District of Michigan and that he be placed on administrative leave with pay pending the disposition of the indictment returned against him by a grand jury in the Eastern District of Michigan charging a violation of 19 U.S.C. 154, prohibited purchase from the estate of bankrupt.
>
> The Council concludes that the effective and expeditious Administration of the business of the courts within this circuit requires that the administration of the Bankruptcy Court for the

> Eastern District of Michigan be placed under the supervision of the United States District Court for the Eastern District of Michigan. Such supervision should include the oversight of the general operation of the Bankruptcy Court Clerk's Office, the appointment of an Acting Clerk of the Bankruptcy Court and the *approval of all personnel actions affecting employees of the Bankruptcy Court.*
>
> It is therefore ordered that, until further order of this Council, the administration of the Bankruptcy Court for the Eastern District of Michigan shall be placed under the supervision of the United States District Court for the Eastern District of Michigan. Such supervision shall include the oversight of the general operation of the Bankruptcy Court Clerk's Office, the appointment of an Acting Clerk of the Bankruptcy Court *and the approval of all personnel actions affecting employees of the Bankruptcy Court.* (emphasis added).

A copy of the Judicial Council's order is Appendix C hereto.

The district court's response to the Judicial Council's order was an order, dated May 18, 1981, signed by all of the district judges of the Eastern District of Michigan, except Chief Judge Feikens. The order quoted the final paragraph of the Judicial Council's order, and recited:

> The Judicial Council of the United States Court of Appeals for the Sixth Circuit having entered an order on May 6, 1981 . . . .
>
> It is ordered, effective May 6, 1981, that John Feikens, the Chief Judge of this Court, be, and he is hereby, authorized to implement the provisions of the order of the Judicial Council above stated.

A copy of the district court's order is Appendix D hereto.

According to the complaint, between December 1979 and May 1981, Guercio provided information on certain unlawful practices in the bankruptcy court to the authorities. (Pet. App. 71a-73a; complaint, ¶¶ 10-15). Guercio

does not allege that any disciplinary action was taken against her for this activity; nor does she allege that either Judge Brody or Judge Feikens expressed any criticism of her as a result of these actions.

Plaintiff was discharged by Judge Brody in October 1981. The complaint alleges that Guercio, upon learning the identity of the nominee to replace the bankruptcy judge who had resigned earlier that year, had obtained copies of newspaper articles critical of that nominee, the Honorable George E. Woods (now a United States District Court Judge), and mailed the articles anonymously to local newspapers as well as to the Federal Bureau of Investigation, the Administrative Office of the United States Courts, a judicial nominating committee, and the United States Attorney's office. (Pet. App. 73a-74a; complaint, ¶¶ 18-20). Woods allegedly responded by refusing to work with Brody unless Guercio was terminated. After taking the issue to Feikens, who approved the decision to terminate Guercio in his capacity as administrator of the bankruptcy court, pursuant to the Judicial Council's order, Brody terminated Guercio's employment. (Pet. App. 74a; complaint ¶¶ 21-23).

C. The Court of Appeals' Decision

The court of appeals first addressed Judge Feikens' argument that his action approving Guercio's termination pursuant to the order of the Sixth Circuit Judicial Council was a judicial act, protected by absolute judicial immunity. Reviewing the history of the Sixth Circuit's own earlier actions in this case, the court noted that a panel of the Sixth Circuit had, in 1987, reversed the district court's decision according absolute immunity to both judges. Soon thereafter, the full court voted to grant rehearing *en banc* as to Judge Feikens alone. After this Court's decision in *Forrester v. White*, 484 U.S. 219 (1988), however, the court reversed itself:

> In response to *Forrester*, this circuit vacated its order granting rehearing en banc, reinstated its previous mandate . . . relative to Judge Feikens, and remanded the entire matter to the district court in order to "consider the entire case in light of the Supreme Court's decision in *Forrester v. White* and consider the remaining issues in light of *Forrester v. White* and this court's reinstated decision of April 1, 1987."

911 F.2d at 1182; Pet. App. 7a.

Recognizing that, because *Forrester* dealt exclusively with the issue of absolute immunity, the remand order appeared to require the district court to reconsider the absolute immunity issue on the merits,[1] the court of appeals offered the following explanation of the intent behind its remand order:

> While the language of this last mandate would seem to suggest that the district court on remand was to reevaluate the propriety of granting *absolute* immunity in light of *Forrester v. White*, it is difficult to reconcile that suggestion with the court's "reinstatement" of its first opinion in *Guercio I*, which unequivocally denied the availability of absolute immunity for the act in question. The panel's decision in *Guercio I* is the law of this case, and both judges were, accordingly, foreclosed from asserting absolute judicial immunity as a defense against Guercio's charges in future proceedings.

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[1] While raising the possibility that the court of appeals' reinstated 1987 decision on absolute immunity was the law of the case on remand, Pet. App. 40a n.15, the district court did, as the court of appeals' 1988 order instructed, reconsider Judge Feikens' entitlement to absolute immunity in light of *Forrester*. Pet. App. 31a-32a.

911 F.2d at 1182; Pet. App. 7a. In a footnote to this paragraph, the Sixth Circuit stated:

> The possibility that this court desired the district court to reconsider the absolute immunity issue in light of *Forrester* is belied to a large degree by *Forrester*'s unequivocal holding that judges are not entitled to absolute immunity from suit for actions arising out of personnel decisions. *Forrester*, 484 U.S. at 229-30, 108 S.Ct. at 545-46. Thus, although the language of the court's mandate in *Guercio I* is unclear, further consideration of absolute immunity is foreclosed by the *Forrester* rationale.

Id. In effect, both the district court and the court of appeals took the view that, because Judge Feikens' action with respect to Guercio's termination can be characterized as a "personnel decision," *Forrester* dictates that absolute immunity is unavailable. This superficial analysis entirely overlooks the fact that Judge Feikens was acting pursuant to extraordinary powers conferred by the Judicial Council's order, which called upon him to restore public trust in a court system which had been wracked by scandal. In so acting, he made a decision pursuant to judicial authority which should be accorded absolute immunity under *Forrester*. Because Judge Feikens is entitled to absolute immunity, the result reached by the court of appeals is correct, even if that court's qualified immunity analysis is flawed in any way.

The court of appeals' decision, however, represents a straightforward application of the principles of qualified immunity derived from "the seminal case of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)." *Guercio v. Brody*, 911 F.2d 1179, 1182 (1990); Pet. App. 8a. Under those principles, the sole issue raised by defendants' motions to dismiss the complaint was:

> whether plaintiff's rights were so clearly established when she was terminated that Judge

> Feikens should have understood that his conduct at the time he ordered her discharge violated her first amendment right to free speech – a question of law to be decided by the court. *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct 3034, 3038 (1987); *Garvie v. Jackson*, 845 F.2d at 649; *Ramirez v. Webb*, 835 F.2d at 1156.

911 F.2d at 1183; Pet. App. 9a. The right of public employees to speak out on matters of public concern was generally established by *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968), which, the court of appeals, noted, held that:

> [A] public employee's interest in commenting on matters of public concern is protected by the first amendment only insofar as it is of greater weight than the employer's interest in "promoting the efficiency of the public services it performs through its employees."

Id.; Pet. App. 10a. Thus, on a motion to dismiss on qualified immunity grounds:

> [I]t is the responsibility of the court to determine if the law was so clearly established at the time of the incident that a reasonably competent public official should have known that a course of action would be inconsistent with a public employee's rights as defined in *Pickering*.

Id.; Pet. App. 10a.

Accordingly, the court of appeals proceeded by placing the "totality of the well-pleaded, nonconclusory allegations of the complaint on the *Pickering* scale," *id.*, to determine whether "Guercio's rights on the *Pickering* scale, as opposed to whether the general teachings of *Pickering*, were so clear at the time in question that reasonable minds could not differ on the constitutionality of her discharge." *Id.* at 1184; Pet. App. 11a. In other words, the issue was:

> whether Guercio's first amendment rights to free speech were so evident from pre-existing

> law (*viz., Pickering*) when she was ordered discharged by Judge Feikens that, measured objectively, he was under an *affirmative duty to refrain from such conduct. Harlow v. Fitzgerald*, 457 U.S. at 818; *Anderson v. Creighton*, 107 S.Ct. at 3038; *Ohio Civil Service Employees' Ass'n v. Seiter*, 858 F.2d 1171, 1173 (6th Cir. 1988).

Id. (emphasis added).

In so framing the issue, the court of appeals rejected the district court's approach as too "abstract," because it "failed to apply the qualified immunity test *to the facts and circumstances of this case.*" *Id.*; Pet. App. 11a (emphasis in original).

> In sum, the district court's approach failed to apply the *Harlow* test, which in the first instance required a determination of whether a clearly established right was alleged to have been violated, and secondly, a determination of whether a reasonable public official should have known that the conduct at issue was undertaken in violation of that right. As a consequence of its misdirection, the district court erroneously decided the defendant's qualified immunity motion to dismiss without applying the test that had been mandated by the Supreme Court and this circuit . . . .

Id.; Pet. App. 12a. Under well-established precedent, the court of appeals stated,

> [t]he standard to be applied in resolving the "clearly established law" predicate within the *Harlow* touchstone of "objective legal reasonableness" is defined in *Halley v. Briggs* with clarity: *"if officers of reasonable competence could disagree on this issue, immunity should be recognized."* 475 U.S. at 341, 106 S.Ct. at 1096 (emphasis added). The qualified immunity test thus is not as stringent as the district court's disposition would imply, affording as it does

> "ample protection to all but the plainly incompetent or those who knowingly violate the law." *Id.*

Id. at 1185; Pet. App. 13a.

"In light of *Pickering*, and mindful of the appropriate qualified immunity test as defined in *Harlow*," the court of appeals considered "the continuous course of Guercio's conduct between December, 1979 and October, 1981, when she was discharged as recited in the complaint," and asked whether:

> judges of reasonable competence in the position of Judge Feikens at the time here in issue could have disagreed upon whether her right to exercise her first amendment right to free speech without being terminated from her employment was outweighed by the public interest in restoring morale, cooperation, dignity, public respect, and confidence to the United States Bankruptcy Court for the Eastern District of Michigan, a court which had been corroded by corruption and favoritism.

Id. at 1185; Pet. App. 14a.

Observing that the 1984 amendments to the Bankruptcy Code changed the relationship of the bankruptcy court and its judges within the judicial scheme, the court of appeals took judicial notice of the "interdependent working relationship that existed between the bankruptcy and district courts and the judges thereof during 1981 when plaintiff's discharge occurred." *Id.*; Pet. App. 14a. Given this general "historical condition," and also

> mindful of the more particularized circumstances arising out of Judge Feikens's specially delegated responsibility pursuant to the mandate of the Sixth Circuit Judicial Council to restore morale, cooperation, public confidence, and efficient operation in the bankruptcy court,

the court of appeals recognized that, under the circumstances present here, "the potential for internecine conflict in the court was palpable." *Id.* at 1186; Pet. App. 15a.

Accepting as true the nonconclusory allegations of the complaint, the court of appeals noted:

> [I]t appears that Guercio's initiative – launched in 1979 – became, over a period of time, productive in notifying the District Court for the Eastern District of Michigan of improprieties that implicated both unethical and criminal conduct within the Detroit Bankruptcy Court.

Id.; Pet. App. 16a. Based on nothing other that Guercio's role in sparking a criminal investigation and subsequent successful prosecutions, the court of appeals concluded, "judges of reasonable competence could not but have believed that Guercio's job security was protected by the first amendment as interpreted in *Pickering*." *Id.*; Pet. App. 16a.

Up to that point, however, as the court of appeals noted, Guercio was "neither admonished for nor discouraged from pursuing her activities." *Id.*; Pet. App. 16a. Though the Judicial Council of the Sixth Circuit had placed the bankruptcy court in "virtual receivership" and issued a mandate, delegated to Judge Feikens, to rehabilitate that court and assume responsibility for approving "all personnel actions affecting employees of the Bankruptcy Court," no adverse actions of any kind against Guercio are alleged to have occurred until after her action of circulating dated news accounts critical of nominee Woods. *Id.*; Pet. App. 16a.

Carefully reviewing the complaint's allegations with respect to the latter incident, the court of appeals noted that:

> [T]he dated news accounts critical of Woods were circulated after a committee of federal district judges of the Eastern District of Michigan had nominated him to replace Hackett as a bankruptcy judge, after his background and qualifications had been investigated, and after his nomination had been endorsed by a screening committee of three Michigan attorneys. In

> sum, the nominative and appointive procedures, including the required investigations, had been exhausted to completion when petitioner released the dated news accounts, which had been in the public domain for approximately eleven years. The circulation was not accompanied by any newly discovered disclosures of concealed past or current misdeeds or wrongdoing relative to the substance of the circulated news accounts critical of Woods. Guercio did not attest to the truthfulness or accuracy of the circulated news accounts nor did she directly express an opinion as to the integrity, honesty, ability, or other qualifications of Woods to serve as a bankruptcy judge.

Id. at 1187-88; Pet. App. 19a.

In light of the "disruptive implications of the turmoil" in the Detroit Division of the Bankruptcy Court; the "delegated mandate" of the Sixth Circuit Judicial Council, directing the restoration of public confidence and efficient operation of the court "by, among other actions, expeditiously appointing a judge to the vacancy created by the resignation of Judge Hackett"; "the disharmony precipitated by petitioner's distribution of dated news articles"; and the "incipient confrontation manifested by the bitter resentment Woods displayed when he advised Judge Brody that he would, if appointed, refuse to work with Brody unless Guercio's employment were terminated," *id.* at 1188; Pet. App. 19a-20a, the court of appeals concluded that a competent judge in the position of Judge Feikens could have reasonably:

> 1. questioned if the circulation of the dated news accounts constituted an expression of speech protected by the first amendment;
>
> 2. concluded that petitioner's expressions and actions concerning Woods served to frustrate the implementation of the Sixth Circuit Judicial Council's delegated mandate to restore public confidence in the Detroit Bankruptcy

court because they discredited and embarrassed the appointive procedure and raised the genuine spectre of conflict between judges of the court;

3. concluded that Guercio's expression and activities had become a force counter-productive and disruptive to the ongoing effort to rehabilitate and revitalize the operation of the Detroit Bankruptcy Court; and

4. concluded that Guercio was no longer speaking out on matters of public interest, but rather had begun to speak as an employee on matters primarily of personal concern.

Id.; Pet. App. 20a-21a (footnote omitted).

Thus, the court of appeals concluded:

In this court's considered opinion, accepting the totality of plaintiff's well-pleaded allegations as true, judges of reasonable competence in the position of Judge Feikens at the time here in controversy, measured objectively, could have disagreed as to:

1. whether and to what extent Guercio's speech was on a matter of public concern, entitling her to claim the protection of the first amendment; and

2. where the *Pickering* scale, with all of the parties' competing interests in the balance, would ultimately come to rest.

Id. at 1189; Pet. App. 20a-21a. Consequently, the court of appeals concluded:

Guercio's right to protection under the first amendment was not so clearly established at the time that Feikens ordered her termination that any judge of reasonable competence in the position of Judge Feikens, measured objectively, would have clearly understood that he was under an affirmative duty to have refrained from such conduct.

Id.; Pet. App. 22a.

For these reasons, the court of appeals held that both Judge Feikens and Judge Brody are entitled to qualified immunity. Accordingly, the district court's denial of their motions to dismiss the complaint was reversed and the case remanded with instructions to vacate the rulings below and dismiss the plaintiff's causes of action insofar as they seek recovery of monetary damages from Brody and Feikens in their individual capacities. *Id.*; Pet. App. 22a.

ARGUMENT

I. THE DECISION BELOW CORRECTLY APPLIES WELL-ESTABLISHED LAW ON QUALIFIED IMMUNITY THAT NEED NOT BE REVIEWED HERE.

The court of appeals' decision applies well-established and squarely applicable decisions of this Court with respect to qualified immunity, including *Anderson v. Creighton*, 483 U.S. 635 (1987); *Mitchell v. Forsyth*, 472 U.S. 511 (1985); and *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and the balancing test mandated in *Pickering v. Board of Education*, 391 U.S. 563 (1968), for determining the constitutionality of the termination of public employees who claim they have been terminated in retaliation for the exercise of first amendment rights. In accordance with the principles set forth in these cases, the court of appeals determined, as a matter of law, that:

> Guercio's right to protection under the first amendment was not so clearly established at the time that Feikens ordered her termination that any judge of reasonable competence in the position of Judge Feikens, measured objectively, would have clearly understood that he was under an affirmative duty to have refrained from such conduct.

Guercio v. Brody, 911 F.2d 1179, 1189 (1990); Pet. App. 22a. Thus, based on the unique facts of this case, as alleged by

plaintiff, Judge Feikens is entitled to the protection of qualified immunity and "is entitled to dismissal before the commencement of discovery." *Id.* at n.7 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)).

Because Guercio cannot plausibly maintain that the decision of the court of appeals is inconsistent with the established precedents of this court or in conflict with any decision of another court of appeals, her Petition resorts instead to innuendo and implication. For example, Guercio argues that this decision must be reviewed because the effect of the court of appeals' decision is to dismiss an "unanswered complaint." Pet. at 8. The express purpose of qualified immunity, however, is "to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982) (quoting *Butz v. Economou*, 438 U.S. 478, 506 (1978)). It is for this reason that "qualified immunity represents the norm" for high government officials. *Id.* In reaffirming this principle, this Court has expressly held that a defendant is "entitled to dismissal prior to discovery" if the actions alleged "are actions that a reasonable officer could have believed lawful." *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987). In fact, it is plaintiff who benefits from the presumption of truth accorded to all non-conclusory allegations of the complaint on this motion to dismiss, and therefore Guercio has no reason to object that the complaint is "unanswered."

Similarly, by frequent reference to the backdrop of bankruptcy court corruption against which the events alleged in the complaint took place, Guercio apparently seeks to imply that Judge Feikens – the very man who was responsible for restoring the integrity of the bankruptcy court – was motivated by something other than the mandate set forth in the Judicial Council's order to restore public confidence in a court wracked by scandal.

In fact, however, there are no allegations in the complaint that would support that implication, and the complaint alleges, to the contrary, that it was Judge Feikens who ordered the investigation which resulted in the resignation of a bankruptcy court judge and the conviction of several individuals implicated in the corruption. Pet. App. 72a; complaint ¶ 13. The only basis for implying that Judge Feikens was even insufficiently zealous in opposing that corruption is the allegation, in paragraphs 10-12 of the complaint (Pet. App. 71a-72a), that he did not immediately order an investigation when Guercio first telephoned to inform him of problems she had perceived.

Finally, there is no basis other than supposition for Guercio's conclusory assertion that, in terminating her, defendants sought somehow to punish her for her role as a "whistleblower." Nor is there even an allegation that Judge Feikens acted to protect his own personal interests or reputation. Rather, the gravamen of Guercio's complaint is that Judge Feikens was too zealous to preserve the integrity and unity of the court he had been specially appointed to oversee (which court had a pressing need for a new judge to replace the one who had resigned under a cloud), and too solicitous of the wishes of an all-but-confirmed nominee to that court, who allegedly took offense at Guercio's apparent attempt to embarrass his confirmation process. As the court of appeals recognized, acting to terminate Guercio before she had taken the step of circulating dated newspaper articles critical of the new nominee might have given rise to a violation of her first amendment rights. *See* 911 F.2d at 1186; Pet. App. 16a. No such action was taken at that time, however; nor was any disciplinary action taken at that time; nor has Guercio alleged that either defendant ever so much as spoke a critical word to her with respect to her "whistleblowing" activities. On the contrary, it was only after her subsequent circulation of the articles that her termination took place.

Despite the implications and inuendo in the Petition, the decision in the court below raises no new legal issues, does not conflict with prior decisions of this Court or of other circuits, and is fundamentally sound. In short, the decision below presents no basis for review by this Court.

II. THIS COURT SHOULD NOT REVISIT THE COURT OF APPEALS' ASSESSMENT OF THE FACTS ALLEGED IN THE COMPLAINT.

A. The Court of Appeals Correctly Held that a Reasonable Judge in Judge Feikens' Position Could Have Acted as He Did.

Application of the qualified immunity test required the court of appeals to determine whether the plaintiff's rights were so clearly established at the time of the events alleged in her complaint that a reasonably competent judge must have known that terminating her would violate her constitutional rights. Thus, under the applicable law, as set forth in *Pickering v. Board of Education*, 391 U.S. 563 (1968), and based on the facts alleged in the complaint, the court of appeals had to assess whether, in 1981, a judge in Judge Feikens' position could have believed that the circulation of dated news accounts by Guercio was not protected speech under the first amendment, or could have believed that institutional concerns, such as the potential for disruption of the ongoing effort to rehabilitate the bankruptcy court in Detroit, outweighed Guercio's right to act as she did. Two experienced judges of the court of appeals, after a careful assessment of the allegations, concluded that a reasonable judge could have reached either conclusion, and therefore it cannot be said that Judge Feikens was "under an affirmative duty to have refrained" from terminating Guercio. 911 F.2d at 1189; Pet. App. 22a. A third judge, while dissenting, did so reluctantly, apparently because he thought the qualified immunity issue should have been resolved on a motion for summary judgment, in that "the motion to

dismiss requires us to take as true conclusory allegations in the amended complaint that may be inconsistent with other factual predicates in the complaint and with the historical record of what actually happened in the bankruptcy court. . . . " 911 F.2d at 1190-91; Pet. App. 26a-27a. The dissent cites no authority for its position that conclusory allegations that contradict specific factual allegations must be presumed true on a motion to dismiss based on qualified immunity.

Guercio's bald statement that "[n]o reasonable federal judge could question whether such speech was an expression of speech protected by the First Amendment," Pet. at 9, and that "no reasonable judge" would have terminated Guercio under the circumstances present here, Pet. at 10, flies in the face of the fact that two federal judges have joined in an opinion that contradicts her sweeping pronouncements. And when Guercio offers advice on how Judge Feikens might better have handled this crisis, Pet. at 10, she offers information of no possible relevance to the question decided by the court of appeals. The question is not whether Judge Feikens' action was the wisest possible action under the circumstances, but whether, under the facts alleged, any reasonable judge would have known that he or she was foreclosed from taking action against Guercio, because terminating her would *necessarily* violate her constitutional rights. As the court of appeals' meticulous opinion shows, a reasonable judge would not necessarily have come to that conclusion, and Judge Feikens is therefore entitled to qualified immunity as a matter of law.

B. The Court of Appeals Correctly Relied in Its Assessment Upon Only the Well-Pleaded, Non-Conclusory Allegations in the Complaint.

Apart from rhetoric, the substantive portion of the Petition consists of a series of quibbles addressed to the court of appeals' handling of the factual allegations of the

complaint. For example, in addition to alleging that her distribution of articles critical of Judge Woods had sown seeds of dissension between nominee Woods and Judge Brody, and that the ensuing dispute had been taken to the Chief Judge for resolution, the complaint also states, in contradiction to the above, that her action had caused "no disruption" in the court. *See* Pet. at 12. The court of appeals resolved this contradiction by limiting its analysis to "the totality of the well-pleaded, non-conclusory allegations of the complaint." 911 F.2d at 1183.

In so doing, the court of appeals was conforming its analysis to that prescribed by *Anderson v. Creighton*, 483 U.S. 635 (1987), which made it clear that, even though a constitutional right may be "clearly established" as a general proposition, a relatively particularized pleading of constitutional violation is necessary to withstand a motion for dismissal on grounds of qualified immunity. In *Anderson*, this Court held that the Court of Appeals erred in holding the defendant FBI agent was not entitled to dismissal on qualified immunity grounds simply because a general right not to be subjected to warrantless searches without probable cause or exigent circumstances was clearly established at the time.

The courts of appeals have followed *Anderson* in reversing the denial of dismissal on qualified immunity grounds where the plaintiff relied upon conclusory allegations of constitutional violation. *See, e.g., Gutierrez v. Municipal Court*, 838 F.2d 1031, 1051 (9th Cir. 1988); *Martin v. Malhoyt*, 830 F.2d 237, 255 (D.C. Cir. 1987); *Myers v. Morris*, 810 F.2d 1437, 1457 (8th Cir. 1987). *See also Geter v. Fortenberry*, 849 F.2d 1550, 1557 (5th Cir. 1988) ("Allowing [plaintiff] further discovery would amount to condoning a fishing expedition and would undermine the policies behind the immunity defense."); *Dominique v. Telb*, 831 F.2d 673, 676 (6th Cir. 1987) (vacating the denial of a motion to dismiss on qualified immunity grounds

because the trial court placed the burden on the defendant to show entitlement to qualified immunity, and noting that plaintiff should plead "in the original complaint all of the factual allegations necessary to sustain a conclusion that defendant violated clearly established law."); *Brown v. Texas A&M Univ.*, 804 F.2d 327, 333 (5th Cir. 1986) ("[P]laintiff must plead specific facts with sufficient particularity to meet all the elements necessary to lay a foundation for recovery, *including those necessary to negative the defense of qualified immunity.*" (emphasis added)). Accordingly, the court of appeals here was under no obligation to accept as true conclusory allegations of "no disruption" that actually contradicted other specific factual allegations in the complaint.

Here, the court of appeals based its conclusions upon judicially noticeable facts (such as those contained in the appendices to this brief) and the well-pleaded, non-conclusory allegations of the complaint (including those detailing Judge Feikens' involvement in the investigation, "which Judge Feikens requested and endorsed, and in which he actively participated along with the plaintiff and other authorities within the limits of his office," 911 F.2d at 1186; Pet. App. 16a). The court also observed that Judge Feikens' "desire to prevent [internecine] conflict was both genuine and compelling." *Id.* "Nothing in the record," Guercio objects, "evidences Judge Feikens' subjective desires." Pet. at 13. Whether or not Judge Feikens' subjective concerns may legitimately be inferred from the record, however, is of no consequence. Subjective intent is legally irrelevant under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and was not taken into account in the court of appeals' objective assessment of the facts of this case. In summarizing what a "competent judge in the position of Judge Feikens" could reasonably have concluded under the circumstances alleged here, for example, 911 F.2d at 1188; Pet. App. 20a-21a, the court of appeals completely

disregards any conclusions about Judge Feikens' subjective intentions or desires, instead applying the objective test required by *Harlow*. Guercio's reliance upon the court's passing reference to Judge Feikens' subjective intent is altogether misplaced.

C. The Petition's Quibbles with the Phrasing Employed in the Court of Appeals' Opinion Present No Basis for Review by this Court.

At pages 14-16 of the Petition, Guercio seems to argue that this Court must review the court of appeals' decision in order to correct that Court's inartful phrasing. The Petition fails to show that this inartful phrasing, however, gave rise to any substantive or procedural error.

For example, Guercio takes issue with the court of appeals' statement, based upon paragraphs 17-20 of the complaint, that "the nominative and appointive procedures, including the required investigations, had been exhausted to completion when Guercio released the dated news accounts." Pet. at 14. Guercio apparently infers that the court of appeals meant by this that Guercio's action came too late to have any effect upon the process, and takes umbrage at the locution. In fact, the court of appeals does not state or assume that the nominee had already been confirmed at the time. The court simply summarizes the allegations of the complaint, to the effect that Woods had already been nominated by a committee of judges and approved by a screening committee of attorneys. The complaint does not allege that Guercio's action sought to contribute to either the nominative or the appointive processes, but instead presents this action as coming later, after these initial steps, which ordinarily delve quite deeply into the candidate's background, had been completed.

It is true that the record does not reveal whether or not the information contained in the news accounts had

been reviewed by the responsible committees or not. Guercio's apparent inference that the court of appeals assumed the committees had reviewed this information, however, is without basis. A careful reading of the court of appeals' summary of paragraphs 17-27 of the complaint, 911 F.2d at 1187-88; Pet. App. 19a, reveals that the Court accurately assesses just what the complaint does – and does not – allege with respect to the nomination and Guercio's actions in relation to it.

Finally, Guercio takes issue with the court of appeals' statement that Judge Feikens and the Administrative Office "initially withheld formal action on Guercio's original submissions." 911 F.2d 1186; Pet. App. 16a. This is misleading, Guercio contends, because it "robs" her of a "permissible inference," that Judge Feikens in fact did *nothing*, and did nothing because – Guercio implies, but does not suggest outright – he was motivated by something other than the mandate set forth in the Judicial Council's order to restore public confidence in a court wracked by scandal. There is, however, no basis for such an inference from the well-pled factual allegations of the complaint. Indeed, the complaint alleges that Judge Feikens ultimately ordered the investigation that led to the formal action taken against those involved in acts of corruption.

Guercio uses the same tactics of inuendo and implication in her effort to find fault with the court of appeals' reasoning. The court of appeals, however, carried out an earnest, meticulous application of the rules of qualified immunity set forth in this Court's decisions, and the resulting decision is devoid of legal error. Accordingly, the court of appeals' decision need not be reviewed by this Court.

III. THE RESULT REACHED BY THE COURT OF APPEALS ALSO IS WARRANTED ON ABSOLUTE IMMUNITY GROUNDS UNDER *FORRESTER*.

Because Judge Feikens also is entitled to absolute immunity, the result reached by the court of appeals is correct, even if its treatment of the qualified immunity issue was erroneous in some respect.[2] The court of appeals held that Judge Feikens is not entitled to absolute

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[2] In the Sixth Circuit's first opinion in this case, *Guercio v. Brody*, 814 F.2d 1115 (6th Cir. 1987), that court rejected defendants' absolute immunity defense, relying upon *Stump v. Sparkman*, 435 U.S. 349 (1978). After granting rehearing as to Judge Feikens, *Guercio v. Brody*, 823 F.2d 166 (6th Cir. 1987), the Court reinstated its original decision, *Guercio v. Brody*, 859 F.2d 1232 (6th Cir. 1988), but remanded to the district court for further consideration in light of this Court's more recent decision on absolute judicial immunity, *Forrester v. White*, 484 U.S. 219 (1988). The district court on remand again held that Judge Feikens is not entitled to absolute immunity, this time applying the analysis of *Forrester* to the second amended complaint filed after remand, while expressing some doubt as to whether this Court's denial of absolute immunity was not already the law of the case. (Pet. App. 31a-32a & n.15). On appeal, Judge Feikens again argued that he is entitled to absolute immunity under *Forrester*, and the Sixth Circuit's 1990 decision suggested that, despite the wording of its remand order, the 1987 decision should have been deemed the law of the case on the absolute immunity issue. Nonetheless, the Sixth Circuit went on to state that, on the merits, "further consideration of absolute immunity is foreclosed by the *Forrester* rationale" that "judges are not entitled to absolute immunity from suit for actions arising out of personnel decisions." *Guercio v. Brody*, 911 F.2d 1179, 1182 n.2 (6th Cir. 1990); Pet. App. 7a. Because the Sixth Circuit's order of remand left this issue open, and both the district court and the court of appeals then proceeded to address Judge Feikens' absolute immunity arguments on the merits in light of the second amended complaint filed after remand, this issue is still subject to review on the merits by this Court.

immunity under the rationale of *Forrester v. White*, 484 U.S. 219 (1988), that "judges are not entitled to absolute immunity from suit for actions arising out of personnel decisions." *Guercio v. Brody*, 911 F.2d 1179, 1182 n.2 (6th Cir. 1990); Pet. App. 7a. The *Forrester* case, however, unlike the instant case, was essentially a case about an ordinary "personnel decision." Here, however, a personnel decision was made pursuant to extraordinary judicial powers delegated to address an unusual and severe threat to the integrity of a United States bankruptcy court. Thus, the outcome in *Forrester* does not mean that Judge Feikens should not be accorded absolute judicial immunity for his role in Guercio's termination.

In *Forrester*, this Court considered the question of whether a state court judge had absolute immunity from a suit for damages under 42 U.S.C. § 1983 for a decision to dismiss a probation officer. The judge had authority under state law to hire and fire probation officers at will. The plaintiff, however, alleged that she had been dismissed on account of her sex, and a jury awarded her damages on that basis. Subsequently, the district court set aside the verdict and granted summary judgment on the grounds of absolute judicial immunity. A divided panel of the Seventh Circuit affirmed the summary judgment. *Forrester v. White*, 792 F.2d 647 (7th Cir. 1986).

This Court reversed, reaffirming the "functional approach" to immunity questions exemplified in *Stump v. Sparkman*, 435 U.S. 349 (1978):

> When applied to the paradigmatic judicial acts involved in resolving disputes between parties who have invoked the jurisdiction of a court, the doctrine of absolute judicial immunity has not been particularly controversial. Difficulties have arisen primarily in attempting to draw the line between truly judicial acts, for which immunity is appropriate, and acts that simply happen to have been done by judges. Here, as in other contexts, *immunity is justified and defined by the*

> *functions it protects and serves*, not by the person to whom it attaches.
>
> This Court has never undertaken to articulate a precise and general definition of the class of acts entitled to immunity. The decided cases, however, suggest an intelligible distinction between judicial acts and the administrative, legislative, or executive functions that judges may on occasion be assigned by law to perform.

484 U.S. at 227 (emphasis added).

In deciding that the judge in *Forrester* was "acting in an administrative capacity" when he discharged the plaintiff, 484 U.S. at 229, and therefore was not entitled to absolute immunity, this Court did not depart from previous precedent. This Court did suggest, however, that an appropriate means of delineating what is functionally a "judicial act" is to consider whether one's criterion for judicial immunity "serves to distinguish judges from other public officials who hire and fire subordinates." 484 U.S. at 229-30. Thus, because the key criterion employed by the Seventh Circuit – essentially, whether concern over the threat of litigation would impair the quality of the judge's decisions regarding personnel matters – could also be applied to justify absolute immunity for executive officials, and because absolute immunity is not available to executive officials under like circumstances, it was held that absolute judicial immunity was not available to the state court judge who terminated his probation officer.

The present case is factually distinguishable from *Forrester*. Ms. Guercio was not Judge Feikens' subordinate. Judge Feikens' role in approving Judge Brody's decision to terminate plaintiff Guercio was thrust upon him by an order of the Judicial Council under 28 U.S.C.

§ 332(d)(1)[3] and an order of the district court. Section 332(d) provides for the delegation of broad authority by the Judicial Council to judges who assume, by this delegation, a mandatory duty to exercise discretionary authority to achieve the remedial goals of the Judicial Council. Section 332(d)(1) provides that "Each judicial council shall make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit." The next subsection of the statute provides: "All judicial officers and employees of the circuit shall promptly carry into effect all orders of the judicial council." 28 U.S.C. § 332(d)(2).

The Judicial Council's order imposed responsibility for the operations of the bankruptcy court, including "approval of all personnel actions affecting employees of the Bankruptcy Court," upon the United States District Court. A second order signed by all of the other judges of the United States District Court for the Eastern District of Michigan delegated that responsibility to then Chief

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[3] 28 U.S.C. § 332(d) provides:

(1) Each judicial council shall make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit. Each council is authorized to hold hearings, to take sworn testimony, and to issue subpoenas and subpoenas duces tecum. Subpoenas and subpoenas duces tecum shall be issued by the clerk of the court of appeals, at the direction of the chief judge of the circuit or his designee and under the seal of the court, and shall be served in the manner provided in rule 45(c) of the Federal Rules of Civil Procedure for subpoenas and subpoenas duces tecum issued on behalf of the United States or an officer or agency thereof.

(2) All judicial officers and employees of the circuit shall promptly carry into effect all orders of the judicial council.

(3) Unless an impediment to the administration of justice is involved, regular business of the courts need not be referred to the council.

Judge Feikens. See Appendices C and D hereto. Thus, *Forrester* does not mandate the denial of absolute immunity in the present case. Moreover, the authority conferred by the Judicial Council's and the district court's orders on Judge Feikens was of a kind that, under the *Forrester* test, one cannot imagine being exercised by anyone except a judge. Although the investigatory and remedial powers given to judicial councils by section 332(d)(1) are not well-defined, they surely are in part judicial or quasi-judicial; indeed, the necessity and legitimacy of the quasi-judicial powers conferred by this provision have been acknowledged by the courts. For example, the Eleventh Circuit has upheld the subpoena power of Judicial Councils under 28 U.S.C. § 332(d)(1). *In re Certain Complaints under Investigation by an Investigating Committee of the Judicial Council*, 783 F.2d 1488 (11th Cir. 1986).

The clear purpose of the Judicial Council's order in the present case was to take steps to restore public trust in a court system which had been wracked by scandal. If the Judicial Council simply had wished to see that sound personnel decisions were being made within that court system, it could have appointed a person experienced in judicial administration for this task, and conserved the district's judicial resources for judicial labors. The decision to place the bankruptcy court in a virtual receivership, giving the district court authority to oversee all matters bearing upon the effective administrative of justice in that court, was an extraordinary measure, but one clearly warranted by events surrounding the issuance of the Order. See Appendices A and B hereto.

The remedy imposed upon the bankruptcy court by the Judicial Council's order created unique demands upon Judge Feikens' judicial expertise, far removed from the sometimes stressful, yet more commonplace, demands imposed upon all those called upon to make personnel decisions. The broad range of criteria relevant to restoring public trust in a court system cannot be

equated with those ordinarily applied to review a personnel decision. The action taken by Judge Feikens in approving plaintiff Guercio's termination was not a typical judicial decision, but neither was it a typical personnel decision. Equating it with the action taken by the judge in *Forrester* would both expand the holding in that case and denigrate the role thrust upon Judge Feikens by the Judicial Council in this one.[4]

The act for which Guercio seeks damages from Judge Feikens was a judicial act, subject to absolute judicial immunity. This conclusion derives from the "functional approach" to absolute judicial immunity set forth in *Stump v. Sparkman* and reaffirmed by *Forrester*. The Judicial Council delegated judicial authority by its Order, and the exercise of that authority required Judge Feikens to function as a judge in balancing individual interests against a need to restore public trust in a troubled court system. Moreover, Judge Feikens' act of approving Guercio's termination was an exercise of judicial power under 28 U.S.C. § 332(d). Thus, the court of appeals erred in rejecting Judge Feikens' absolute judicial immunity defense in reliance on *Forrester*. Because the court of appeals reached a correct result, i.e., dismissal of Guercio's complaint, albeit for other reasons, Judge Feikens' entitlement to absolute immunity simply represents an additional ground for denying the petition for certiorari.

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[4] Indeed, a reasonable judge in Judge Feikens' position would have had reason to believe that his role in carrying out this responsibility came within the protections afforded by absolute immunity, an additional reason why, even if this Court were of the view that absolute immunity should not extend this far, qualified immunity should protect Judge Feikens from liability for his role in Guercio's termination.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JAMES K. ROBINSON
JAY E. BRANT
LEE W. BROOKS
HONIGMAN MILLER SCHWARTZ AND COHN
2290 First National Building
Detroit, Michigan 48226
(313) 256-7800
Counsel of Record for Respondent
United States District Judge John Feikens

April 10, 1991

APPENDIX A

BANKRUPTCY JUDGE MERIT SCREENING COMMITTEE REPORT on BANKRUPTCY JUDGE HARRY G. HACKETT

To: Honorable George Edwards, Chief Judge
United States Court of Appeals for the Sixth Circuit

Section 404 (b) of the Bankruptcy Reform Act, P.L. 95-598 provides for the establishment of Merit Screening Committees to advise the Chief Judge of the circuit regarding the qualifications to remain in office of incumbent bankruptcy judges whose terms of office expire between October 1, 1979 and March 31, 1984. Under the Provisions of that section of the Act the term of office of an incumbent bankruptcy judge automatically is continued until March 31, 1984 unless the Chief Judge of the circuit finds the bankruptcy judge to be not qualified after consultation with a Merit Screening Committee.

Section 404(c) of the Act provides for the establishment of the Merit Screening Committee. For each state there shall be established a Merit Screening Committee composed of the President or the designee of the President of the State Bar Association, the Dean or the designee of the Dean of a law school located within the state and the President or the designee of the President of a local bar association for the official headquarters location of the incumbent bankruptcy judge. Section 404(c) further provides that the Merit Screening Committee shall be organized and summoned to meetings by the Circuit Executive.

The term of office of Bankruptcy Judge Harry G. Hackett of Detroit, Michigan expires on June 30, 1981.

Judge Hackett was appointed as bankruptcy judge on July 1, 1957. He received his undergraduate and his law degrees from Wayne State University in 1949 and 1952, respectively. He has been admitted to practice in state and federal courts in Michigan. He engaged in private practice of law from 1952 until 1954 when he was appointed law clerk to the Honorable Frank A. Picard, U.S. District Judge for the Eastern District of Michigan. He served a [sic] Judge Picard's law clerk until his appointment as bankruptcy judge in 1957. Judge Hackett is 58 years of age and reports that he is in excellent health.

On January 14, 1981 a Merit Screening Committee for Bankruptcy Judge Hackett was organized by the Circuit Executive. Invitations to serve on the committee were issued to Dean S. Lewis, President, State Bar of Michigan, Wolfgang Hoppe, President, Detroit Bar Assocation [sic] and Terrance Sandalow, Dean, University of Michigan Law School. Mr. Lewis designated Joseph L. Hardig, Jr. of Birmingham, Michigan to serve on the committee. Mr. Hoppe and Dean Sandalow accepted the invitation and served on the committee.

The Merit Screening Committee held its first meeting on March 3, 1981 at Detroit, Michigan. It was agreed that the following general criteria would be used by the committee in determining whether this incumbent bankruptcy judge is qualified to remain in office: (1) health; (2) judicial temperament; (3) knowledge of the law and procedure; (4) industry and productivity; and (5) observance of the canons of ethics.

The committee further determined at the first meeting that the following procedures were necessary for the

proper discharge of its duty: (1) public notice of the formation of the committee, its purpose and a request for submission of written statements of views by any interested persons; (2) surveys of bar associations or attorneys knowledgeable in the area of practice within the territorial jurisdiction of the bankruptcy judge; (3) completion by the bankruptcy judge of a detailed questionaire; (4) solicitation of the views of the district judges of the district; and (5) a personal interview with the incumbent bankruptcy judge under review.

The committee followed each of the procedures and inquired into each of the areas outlined above. A notice inviting comment on Judge Hackett's qualifications to remain in office was submitted for publication to the State Bar of Michigan, the Detroit Bar Association, the Wolverine Bar Association, the Oakland County Bar Association and the Macomb County Bar Association. Notices also were submitted for publication in the *Detroit Legal News*, the *Pontiac-Oakland County Legal News* and *The Legal Advertiser* all legal newspapers in the greater Detroit area. Press releases regarding the formation of the committee, its purpose and its request for comments from interested persons were issued to the *Detroit Free Press*, the Detroit *News*, the *Michigan Chronicle*, *The Macomb Daily* and the *Daily Tribune* of Royal Oak, Michigan. At the committee's request Judge Hackett completed a detailed questionaire [sic] which included a number of opinions written by him. As a result of certain information received by the committee regarding an investigation by the FBI into possible criminal conduct involving employees and practitioners in the bankruptcy court, the committee requested from the United States Attorney for

the Eastern District of Michigan any information in his files which might be subject to disclosure and relevant to the committee's inquiry. The United States Attorney agreed to provide non-grand jury materials in his files consisting primarily of FBI reports of witness statements provided that Judge Hackett execute a waiver of his Privacy Act right of nondisclosure of such information. Upon request of the committee Judge Hackett gave the committee such a waiver and the United States Attorney provided the requested information.

The committee also invited comments from all of the district judges for the Eastern District of Michigan. At the invitation of the committee Chief Judge John Feikens of the United States District Court for the Eastern District of Michigan met with the committee to discuss Judge Hackett's qualifications at a meeting of the committee held in Ann Arbor, Michigan on April 28, 1981. Another meeting of the committee was held in Detroit, Michigan on May 29, 1981, at which time the committee interviewed Judge Hackett. The final meeting of the committee was held in Ann Arbor, Michigan on June 8, 1981.

Judge Hackett's response to the questionaire [sic], the comments of the members of the bar, the information provided by the United States Attorney and all other papers relating to the proceedings of the committee are in the files of the Circuit Executive and may be examined more fully by you if you so desire.

The comments and other information received by the committee show Judge Hackett to be a man of many facets. Many members of the bar had high praise for Judge Hackett's performance as a bankruptcy Judge.

Many members of the bankruptcy bar consider Judge Hackett to be fair, efficient and productive in the administration of his docket. It appears that many attorneys prefer to appear before him because of his pragmatic approach and because they believe that he is a fair and competent bankruptcy judge. There appears to be no question that Judge Hackett is knowledgeable in the substantive law and procedure of bankruptcy.

In addition to the positive information outlined above, however, the committee received substantial information raising serious questions about Judge Hackett's conduct on and off the bench. Of particular concern is Judge Hackett's relationships with certain attorneys and parties appearing before him in bankruptcy court. These relationships give rise to serious problems regarding Judge Hackett's observance of the provisions of the canons of ethics relating to the integrity and appearance of impartiality in the bankruptcy court.

With respect to much of the conduct outlined below the committee was faced with some degree of factual dispute. It is clear that the Congress did not intend for merit screening committees to conduct adversary proceedings to resolve such disputes. The committee has no authority to issue process, to examine witnesses under oath or to provide the opportunity for cross examination of witnesses. Nevertheless the committee must weigh the information which it has received and make some basic credibility judgments. Where the information coming to the committee is sharply disputed from a number of sources as to the fact of occurrence or non-occurrence of the conduct, the committee has made no ultimate determination but has simply reported to you the existence of

such information in the files. In other areas of conduct outlined in this report the committee, after reviewing all of the various sources of information and the degree of dispute over basic facts, has concluded that it can make determinations of the existence of substantial evidence to support the allegations of misconduct.

One of the most serious allegations relating to Judge Hackett's relationships with attorneys practicing before him, and for which the committee has concluded that there is substantial evidence, is the charge that Judge Hackett permitted attorneys appearing before him to make gifts to female employees of the bankruptcy court with whom Judge Hackett was maintaining a relationship. For example, the committee was presented with substantial evidence that Irving August, a prominent bankruptcy attorney who frequently appeared before Judge Hackett and who has been awarded large fees by Judge Hackett, offered to the female deputy clerk with whom Judge Hackett had a relationship $15,000 to be used as a down payment on a condominium and did give her a check in the amount of $1,000 to be used to secure her offer to purchase. There also was substantial evidence that John Dougherty, another prominent bankruptcy attorney who also is the standing trustee for Chapter 13 cases, paid for the female employee's air fare to Atlanta and return so that she could join Judge Hackett and Mr. Dougherty who had traveled together to Atlanta and purchased a tire for her automobile. The committee has concluded that these payments were made with Judge Hackett's knowledge and approval.

Several other allegations supported by substantial evidence were received by the committee regarding Judge

Hackett's relationship with attorneys, trustees, receivers and parties appearing before him. While the exact number of such occurrences is in dispute, there appears to be no question from the information received by the committee that Judge Hackett lunched and played golf on numerous occasions with Irving August. On at least one occasion Judge Hackett took a weekend golfing trip with Irving August and two female court employees. It also appears clear that the social relationship between Judge Hackett and Irving August was sufficiently well known to give the impression of, and for many court employees and practitioners to have a reasonable belief in, the ability of Irving August to receive special treatment from Judge Hackett. This appearance of special treatment extended from the size of fees awarded by Judge Hackett to the special status accorded Irving August in his dealings with the bankruptcy court's clerk's office in matters such as his ready access to the general office, the Xerox machine and office telephones, privileges not accorded members of the bar, generally.

The committee also must bring to your attention the existence of a series of broadcasts on radio station WJR in Detroit regarding Judge Hackett and the bankruptcy court in general and a current FBI investigation into possible criminal conduct by employees and attorneys connected with the bankruptcy court. Transcripts of the WJR series are in the files of the circuit executive and may be more fully examined by you if you so desire. Those broadcasts raise many of the same allegations of conduct on the part of Judge Hackett which are raised in this report. The WJR broadcasts also deal with the FBI investigation which is focusing on apparent manipulation

of the blind draw assignment system for bankruptcy cases. During a one year period from October 1979 to October 1980 the intake and assignment function primarily was the responsibility of one Kathy Bogoff. During this time Miss Bogoff was involved in a relationship with Irving August and appears to have received substantial funds and gifts from him. For the year that Miss Bogoff served as intake deputy over half of Irving August's Chapter 11 cases were assigned to Judge Hackett, and only ten percent were assigned to Judge Brody who Irving August wished to avoid because of dissatisfaction with the amount of fees approved by Judge Brody. The remaining 35% of Irving August's Chapter 11 cases were assigned to Judge Patton, but it should be noted that the investigation has disclosed many instances of Judge Hackett acting for Judge Patton without a formal reassignment of the case. The investigation is continuing into allegations that Judge Hackett may have received money or gifts from Irving August in exchange for some participation or approval of this scheme and allegations that Irving August may have made payments of money or gifts for and on behalf of Judge Hackett to female employees of the court with whom Judge Hackett has had relationships.

It is not possible or appropriate for the committee to attempt to resolve the validity of the allegations of possible criminal conduct. The investigation and final resolution of those matters will continue by the appropriate authorities. While the committee has not looked into this matter from the standpoint of assessing responsibility for the apparent manipulation of the assignment of cases, it does appear to the committee that all three bankruptcy

judges in Detroit must bear some responsibility for permitting Miss Bogoff to remain in the sensitive position involving the assignment of cases in light of her well known involvement with Irving August.

From the information available to it the committee believes that there is a reasonable basis for the FBI investigation which is grounded in part on the same kinds of conduct by Judge Hackett outlined in this report such as the apparent special relationship between Irving August and Judge Hackett which give rise to serious questions of integrity and impartiality in the bankruptcy court.

Other substantial evidence relating to social relationships raising the appearance of impropriety between attorneys and parties appearing before Judge Hackett was received by the committee. On one instance Judge Hackett was alleged to have played golf with an officer of a debtor corporation who was scheduled to appear before Judge Hackett in a contested matter involving disposition of assets of the corporation, and as indicated above, Judge Hackett took a trip with John Dougherty, a prominent bankruptcy practitioner and a female court employee.

There also came to the attention of the committee instances of Judge Hackett's handling of cases which raise questions of propriety. A most serious question was raised in relation to the matter of fees in a major reorganization case in which the receiver, an attorney, filed a petition for interim fee. the creditors were notified by the court in the usual course of business of the filing of the fee petition with a form notice which stated that a petition had been filed requesting a fee in the amount of

$50,000. The attorney for one of the creditors requested and received from the receiver a copy of the petition, and that copy also showed the amount requested to be $50,000. Based on an understanding that the interim fee requested by the receiver was $50,000 and represented compensation for services performed from the date of his appointment until the date of the petition, a period of nine months, the creditor decided not to object to the fee petition. The creditor was not served with a copy of the order allowing the fee and only learned some six months later that Judge Hackett had authorized a fee of $75,000 for the receiver and had allocated that amount to the receiver's first four months or service. The official court record in the case contains a petition signed by the receiver requesting a fee in the amount of $75,000, although both the court notice of the filing of the fee petition and the copy of the fee petition given to the attorney for the creditor show the amount requested to be $50,000. The court records also show that the creditor specifically raised this discrepancy in a written objection to a second fee petition filed by the receiver, but the issue was not dealt with by Judge Hackett in his opinion and order approving the second interim fee petition. Other instances of actions in cases which raise questions of propriety include apparent changes in the terms and conditions of sales of property from bankruptcy estates and the apparent setting aside of orders previously entered by another bankruptcy judge. There also were substantial allegations of ex parte contacts wtih [sic] attorneys and parties in cases before him.

Canon 2 of the Code of Conduct for United States Judges, which also is applicable to bankruptcy judges,

states: "A Judge should avoid impropriety and the appearance of impropriety in all his activities.

"A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

"A judge should not allow his family, social or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. . . . "

Without expressing any opinion whatsoever on the merits of the allegations of criminal conduct on the part of anyone involved in the investigation, the committee concludes that Judge Hackett's conduct on and off the bench in his relationships with attorneys, parties and employees of the courts demeans the integrity of the court system and creates the appearance of impropriety. As noted in the official commentary to Canon 2 of the Code of Conduct, "(A Judge) must expect to be the subject of constant public scrutinity [sic]. He must therefore accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly." A bankruptcy judge's observance of the Canons with respect to the appearance of propriety is especially important in view of his authority and discretion to fix fees of attorneys practicing before him.

Substantial evidence also was received by the committee of numerous instances of Judge Hackett being inebriated during and after working hours in restaurants

and bars in the environs of the federal courthouse which often were frequented by attorneys and court employees. The evidence shows that on at least some of those occasions Judge Hackett engaged in conduct unbecoming to a judge.

The committee also received some evidence that Judge Hackett on occasion performed judicial duties on the bench and in chambers in an inebriated condition. Affidavits were received by the committee stating that Judge Hackett was visibly intoxicated in conducting a hearing in chambers on a proposed sale of assets from an estate. These affidavits were disputed, however, by other persons present at that hearing. In addition, the committee received information from some court employees and members of the bankruptcy bar that Judge Hackett never appeared on the bench in an intoxicated condition. This information was countered by information from other court employees that afternoon proceedings before Judge Hackett often had to be postponed or cancelled because Judge Hackett returned from lunch in an inebriated condition.

In his interview with the committee Judge Hackett stated that he feels he has no problem with the use of alcohol. He did acknowledge the existence of instances of excess drinking in restaurants and bars around the courthouse after working hours. He further stated that it is his practice not to drink alcohol with lunch if he has court proceedings scheduled for the afternoon.

Canon 1 of the Code of Conduct for United States Judges states: "A Judge should uphold the integrity and independence of the Judiciary." The commentary to the

Canon provides that "A judge should . . . establish . . . , maintain . . . and enforc(e) and should himself observe high standards of conduct so that the integrity and independence of the judiciary may be preserved."

The committee finds substantial evidence to support the allegations that Judge Hackett was on numerous occasions inebriated and engaged in unbecoming conduct in restaurants and bars in the area of the federal courthouse. The committee further finds that such conduct is not consistent with the high standards of conduct which would uphold the integrity of the judiciary that is required by Canon 1 of the Code of Conduct.

As noted above the committee met with Chief Judge John Feikens of the District Court at a meeting on April 28, 1981. As Chief Judge of the District Court Judge Feikens expressed the view that by reason of the same kinds of conduct outlined herein, of which Judge Feikens was independently aware, Judge Hackett is not qualified to remain in office after the expiration of his present term, and he recommended that the committee find Judge Hackett not qualified to remain in office.

One of the purposes of the Bankruptcy Reform Act of 1978 was to enhance the status of the bankruptcy court system. It will be given virtual independent status by 1984. The merit screening process must be viewed as a part of the general effort by Congress to enhance the public confidence in the competence and integrity of the bankruptcy courts. In view of the substantial evidence of conduct on the part of Judge Hackett which would tend to, and has had the predictable result of, diminished public confidence in the integrity and impartiality of the

bankruptcy court, the committee concludes that it would be in the best interest of the judiciary if Judge Hackett does not remain in office beyond his present term. Because of the substantial evidence of conduct outlined herein which is in apparent disregard of the Canons of the Code of Conduct, the committee recommends to Chief Judge Edwards that he find Judge Hackett not qualified to remain in office after the expiration of his present term on June 30, 1981.

RESPECTFULLY SUBMITTED

/s/ Joseph L. Hardig, Jr.
Joseph L. Hardig, Jr.
State Bar of Michigan

/s/ Wolfgang Hoppe
Wolfgang Hoppe, President
Detroit Bar Association

/s/ Terrance Sandalow
Terrance Sandalow, Dean
University of Michigan
Law School

June 11, 1981

APPENDIX B

FINDINGS AND REPORT OF GEORGE EDWARDS, CHIEF JUDGE OF THE SIXTH JUDICIAL CIRCUIT IN RE HARRY G. HACKETT, JUDGE U.S. BANKRUPTCY COURT, EASTERN DISTRICT OF MICHIGAN

The final responsibility concerning the continuance or termination of a judicial career is not an easy burden. The maintenance of the integrity of the federal courts is, however, the most important duty of the Chief Judge of any federal circuit.

Under these circumstances, I cannot and I have not simply accepted the recommendation of the highly responsible Merit Screening Committee which has been designated under the Bankruptcy Reform Act to pass upon Judge Hackett's continuance on the bench. On the contrary, I have made a most careful personal review of the entire record accumulated by the Circuit Executive on behalf of the Merit Screening Committee, the investigation of the Administrative Office of the United States Courts, the reports furnished the Committee by the FBI under Judge Hackett's waiver of his right of privacy, and the report of the Committee. The following are my findings:

There are 45 letters of support of Judge Hackett's continuance on the bench in the Bankruptcy Court. Appropriately, they have been furnished by members of the Michigan Bar Association who practice before the Bankruptcy Court, and others who have direct contact with it. These letters attest to Judge Hackett's knowledge of the bankruptcy law, his courtesy to parties and counsel

before him in court, and to his record for industry in the 24 years he has been on the bench. He is described by some as the "workhorse" of the Bankruptcy Court. While some of these letters may well be motivated by self-interest, there are too many from too many diverse sources for these affirmative comments to be set aside. I accept the evaluations recited above as generally well founded.

Unfortunately, there is a completely different side to this story which has led the Merit Screening Committee to recommend to me that I find Judge Hackett not qualified to remain in office after completion of his present term on June 30, 1981. The Committee's report and reasons therefor are attached.

There is proof that a system of "blind draw" case assignment in the Clerk's office of the Bankruptcy Court was completely frustrated. More Chapter 11 cases filed by certain Lawyers (notably Attorney Irving August) were assigned to Judges Hackett and Patton than is consistent with any "blind draw" probability. Many of Judge Patton's assignments subsequently were handled by Judge Hackett.

There is strong evidence of financial and social favors being extended from August to assignment clerk Bogoff, a frequent social companion of August, who, beginning in October 1979, handled most of the case assignments.[1] All of such favors are apparently in violation of Cannon 7

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[1] This report is being called to the attention of the Michigan Bar Association.

(D.R. 7-110 Michigan Code of Professional Responsibility[2]). This relationship was so widely known in the Bankruptcy Court that it is my opinion that Judge Hackett and the other Judges had a duty to be aware of the matter and that he and the other Judges had a duty promptly to correct the problem and failed to do so.

There is evidence that Attorney August received $400,000 in fees approved by Bankruptcy judges during the first nine months of 1980. Many of these fees were approved by Judge Hackett. Judge Hackett and Attorney August were in frequent social contact during 1980 both in and outside of Detroit.

There is evidence of largess on the part of Judge Hackett which is difficult to reconcile with any known source of income.

There is strong evidence that gifts, entertainment, travel costs and money have been tendered to and received by strategically placed Bankruptcy Court employees by lawyers practicing before Judge Hackett, with his knowledge and apparent approval.

There is considerable evidence that favored employees of the Bankruptcy Court have been able to purchase assets of bankrupt estates for nominal sums by private sale practices known to and authorized by Judge Hackett.

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[2] D.R. 7-110 reads: "(A) A lawyer shall not give or lend anything of value to a judge, official, or employee of a tribunal."

There is evidence of Judge Hackett's committing serious indiscretions involving boisterous conduct and abusive language to women, tending to bring the federal judiciary into disrepute, sometimes in the confines of the Bankruptcy Court and more frequently in bars and restaurants nearby.

While much of this record calls for and is receiving careful review by the United States Attorney and the Federal Bureau of Investigation as to possible violations of federal law, no such charges have been made as to Judge Hackett, or any other Bankruptcy Judge, and no implications of violation of law are being or have been relied on by the Merit Screening Committee or by me.

What does appear clear to me is that the findings above represent repeated transgressions of Canons 1 and 2 of the Code of Conduct applicable to judges of the United States Courts, including Bankruptcy Judges.

These Canons (and official comment thereon) are as follows:

PART L CODE OF JUDICIAL CONDUCT FOR UNITED STATES JUDGES[1]

CANON 1

A JUDGE SHOULD UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY

An independent and honorable judiciary is indispensable to justice in our society. A judge

[1]By resolution of the Judicial Conference of the United States this Code has been made applicable to Bankruptcy Judges and to United States Magistrates.

should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

CANON 2

A JUDGE SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL HIS ACTIVITIES

A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness.

COMMENTARY

Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. He must expect to be the subject of constant public scrutiny. He must therefore accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

I recognize that the widespread nature of at least some of the problems cited above may reflect upon other

members of the Bankruptcy Court and other lawyers practicing there. This report and that of the Merit Screening Committee are, however, directed solely to the question of Judge Hackett's qualifications to continue in office and to the degree possible are confined thereto.

The appreciation of this Circuit is expressed to the distinguished members of the Merit Screening Committee who spent many hours and probably some restless nights upon their study and report.

For the reasons outlined above, in accordance with the duty imposed on me by the Bankruptcy Reform Act., P.L. 95-598, and in accordance with the recommendations of the Merit Screening Committee, I find that Judge Harry Hackett is unqualified to remain in office as Judge of the Bankruptcy Court of the Eastern District of Michigan after the expiration of his present term on June 30, 1981.

6/24/81
Date

/s/ George Edwards
George Edwards
Chief Judge

APPENDIX C

JUDICIAL COUNCIL OF THE SIXTH CIRCUIT

In the matter of:
Clerk of the Bankruptcy Court
Eastern District of Michigan

By a companion order entered today the Council has directed that William Harper be suspended from the performance of his duties as Clerk of the Bankruptcy Court for the Eastern District of Michigan and that he be placed on administrative leave with pay pending the disposition of the indictment returned against him by a grand jury in the Eastern District of Michigan charging a violation of 18 U.S.C. 154, prohibited purchase from the estate of a bankrupt.

The Council concludes that the effective and expeditious administration of the business of the courts within this circuit requires that the administration of the Bankruptcy Court for the Eastern District of Michigan be placed under the supervision of the United States District Court for the Eastern District of Michigan. Such supervision should include the oversight of the general operation of the Bankruptcy Court Clerk's Office, the appointment of an Acting Clerk of the Bankruptcy Court and the approval of all personnel actions affecting employees of the Bankruptcy Court.

It is therefore ordered that, until further order of this Council, the administration of the Bankruptcy Court for the Eastern District of Michigan shall be placed under the supervision of the United States District Court for the Eastern District of Michigan. Such supervision shall include the oversight of the general operation of the

Bankruptcy Court Clerk's Office, the appointment of an Acting Clerk of the Bankruptcy Court and the approval of all personnel actions affecting employees of the Bankruptcy Court.

FOR THE COUNCIL

_____

Chief Judge

May 6, 1981

APPENDIX D

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

IN THE MATTER OF

BANKRUPTCY COURT
FOR THE EASTERN
DISTRICT OF MICHIGAN

_____/

Miscellaneous
No. 81 330

The Judicial Council of the United States Court of Appeals for the Sixth Circuit having entered an order on May 6, 1981, which provides in part:

> "It is therefore ordered that, until further order of this Council, the administration of the Bankruptcy Court for the Eastern District of Michigan shall be placed under the supervision of the United States District Court for the Eastern District of Michigan. Such supervision shall include the oversight of the general operation of the Bankruptcy Court Clerk's office, the appointment of an Acting Clerk of the Bankruptcy Court and the approval of all personnel actions affecting employees of the Bankruptcy Court."

IT IS ORDERED, effective May 6, 1981, that John Feikens, the Chief Judge of this Court, be, and he is hereby, authorized to implement the provisions of the order of the Judicial Council above stated.

Dated: May 18, 1981

/s/ Thomas P. Thornton
THOMAS P. THORNTON
U.S. DISTRICT JUDGE

/s/ Ralph M. Freeman
RALPH M. FREEMAN
U.S. DISTRICT JUDGE

/s/ Philip Pratt
PHILIP PRATT
U.S. DISTRICT JUDGE

/s/ Robert E. De Mascio
ROBERT E. DE MASCIO
U.S. DISTRICT JUDGE

/s/ Charles W. Joiner
CHARLES W. JOINER
U.S. DISTRICT JUDGE

/s/ James Harvey
JAMES HARVEY
U.S. DISTRICT JUDGE

/s/ James P. Churchill
JAMES P. CHURCHILL
U.S. DISTRICT JUDGE

/s/ Ralph B. Guy, Jr.
RALPH B. GUY, JR.
U.S. DISTRICT JUDGE

/s/ Julian Abele Cook, Jr.
JULIAN ABELE COOK, JR.
U.S. DISTRICT JUDGE

/s/ Patricia J. Boyle
PATRICIA J. BOYLE
U.S. DISTRICT JUDGE

/s/ Stewart Newblatt
STEWART NEWBLATT
U.S. DISTRICT JUDGE

/s/ Avern Cohn
AVERN COHN
U.S. DISTRICT JUDGE

/s/ Anna Diggs Taylor
ANNA DIGGS TAYLOR
U.S. DISTRICT JUDGE

/s/ Horace W. Gilmore
HORACE W. GILMORE
U.S. DISTRICT JUDGE